

A **ABDUL HAMID SEENI PARKIR v. MAJLIS PERBANDARAN
PULAU PINANG & ORS**

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-7-01-2015]

B 5 APRIL 2016

C ***ADMINISTRATIVE LAW:** Judicial review – Application for – Exercise of
administrative powers by Municipal Council – Decision that business be carried out
on rotational basis – Whether decision ultra vires – Whether decision reasonable
– Whether application for judicial review ought to be allowed*

D The applicant, the son of one SN Seeni Parkir, deceased, contended that his
late father started the Line Clear Restaurant in Penang and that he was the
rightful owner of the restaurant. In 1952, the deceased brought namely one
Thulkarnain and one Rahimatollah from India, as workers in the business.
E In 1959, the business was registered under the name of the Sekandar, a
brother of the deceased. Upon the demise of the deceased, it was agreed
between the applicant's family, Thulkarnain and Rahimatollah that they
would operate the said business together with Sekandar on trust for the
applicant's family. In 1975, as Sekandar also passed away, Thulkarnain and
F Rahimatollah continued to operate the said business. In 1989, the applicant,
being the rightful heir of the deceased, participated in the operation of the
said business. However, as Thulkarnain and Rahimatollah were still holding
licenses in their names, complete handing over of the said business to the
applicant could not be done. Both Thulkarnain and Rahimatollah passed
G away in the 1990's. Subsequently, an unresolved dispute between the
applicant and the second, third and fourth respondents came to the attention
of the first respondent. As a result, the first respondent on 10 November
2014 decided that the business was to be carried out by way of rotation on
a yearly basis among the applicant, second, third and fourth respondents
respectively ('impugned decision'). The applicant, being aggrieved with the
impugned decision, had therefore resorted to the filing of the judicial review.
H The first respondent contended, *inter alia*, that according to a general
agreement dated 10 February 1987 from the year 1988 to 2000; Thulkarnain,
one Aisha and Rahimatollah, as original licence holders, had agreed to
operate the business by way of three rotation until the year 2017. The
applicant had managed the business from Aisha during her rotation.
I However, the applicant refused to return Aisha's rotation to the daughter of
Aisha (fourth respondent). Subsequently, although new hawker's licenses
were issued by the first respondent to the second, third and fourth
respondents, the applicant refused to leave the business and continued to
carry out the business without a hawker's license. The first respondent then
granted the applicant, second, third and fourth respondents time to resolve

the issue of rotation in carrying out the business. The first respondent further contended that the impugned decision was made after listening to all parties and after proper consideration. In the circumstances, the first respondent submitted that the applicant's application ought not to be allowed.

Held (dismissing application with costs):

- (1) In 2012, licenses were granted to the second to the fourth respondents following earlier licenses issued in 1981. This constituted a departure from the earlier policy of the first respondent in 1988 which decided that in the event the license holder passes away or cease from carrying out business, then the stall permit/license cannot be transferred to anybody and the stall shall be demolished. As such, the first respondent had retained the discretion to depart from its earlier policy in so doing. Further, the provisions of ss. 72(1) and 107(2) of the Local Government Act 1976 also conferred wide powers and discretion upon the first respondent in imposing conditions and restrictions in the manner in which licensed hawkers may operate. In the circumstances, the first respondent was entitled where public interest so necessitates, to consider the matter afresh and on the individual merits of the case and so was justified in taking into account the fraternal relationship of these applicants with the previous license holders. (paras 64-66)
- (2) The first respondent did not show that the applicant's father was granted and was in possession of a hawker's license by the first respondent or its predecessor. The applicant also had no license at Line Clear Restaurant previously and no documents to show a contrary position was produced before the court. Therefore, the applicant's submission that he had a right to carry on trading at the said site was thus untenable and the rejection of the applicant's application for business license for Line Clear Restaurant had not infringed his rights. (paras 70 & 71)
- (3) The first respondent had listened to all the views of the parties and had given them reasonable time to resolve the issue of the rotation of the business before making their decision on 10 November 2014. Therefore, there were no procedural impropriety on the part of the first respondent. The first respondent had acted reasonably in allowing the participation of the applicant in the rotation. (paras 80 & 81)
- (4) The applicant who had been operating at the site from 2010 without a hawker's license ought to have ceased operating the said business with effect from 31 December 2014 and have handed over the site to the second respondent for the rotation commencing 1 January 2015. The action of the applicant in preventing the first respondent from commencing enforcement action in compliance with the rotation was unwarranted and constituted an obstruction of the lawful duties by the first respondent. (para 80)

- A (5) It is well within the powers of the first respondent to regulate and license the business of hawking and a very wide discretion and overriding power is accorded to it. It was open to the first respondent to consider the merits of each application on its own and adopt a change of previous policy. Although it had adopted the blood relationship approach in
- B according licenses to the second to the fourth respondents, this could not be taken to give rise to the allegation that it had misdirected itself by asking the wrong question. Accordingly, the powers exercised by the first respondent was not *ultra vires* its powers and was therefore devoid of any element of illegality. (para 95)
- C (6) As the applicant had never previously held any license, the decision of the first respondent could not give rise to any legitimate expectation on the part of the applicant as there was no deprivation of benefit or advantage which had been previously held and enjoyed. Further, as the applicant had been carrying on business at the site from 2010 until 2014 and continuing without a valid license and without the approval of the
- D first respondent, no such legitimate expectation could arise out of such illegal act. (paras 96 & 98)
- (7) The core of the dispute between the applicant and the respondents arose out of a contractual dispute between themselves and could not involve the first respondent as a party with the intention of resolving their private dispute. It is trite that the remedies sought by way of judicial review is in the realm of public law. The decision of the first respondent was not unreasonable in the *Wednesbury* sense nor was it disproportionate under all the circumstances of the case. (paras 100 & 103)
- E
- F

Case(s) referred to:

AmBank (M) Bhd v. Menteri Sumber Manusia & Anor And Other Appeals [2014] 1 LNS 686 CA (*refd*)

Council of Civil Service Unions and Others v. Minister for the Civil Service [1985] AC 374 (*refd*)

- G *John Peter Berthelsen v. Director-General of Immigration Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC (*refd*)

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC (*refd*)

McInnes v. Onslow Fane and Another [1978] 1 WLR 1520 (*refd*)

- H *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC (*refd*)
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC (*refd*)
Tenby World Sdn Bhd v. Soh Chong Wan & Anor [2013] 10 CLJ 822 HC (*refd*)

Legislation referred to:

Local Government Act 1976, ss. 2, 72(1), 107(2), (3)

Rules of Court 2012, O. 53 r. 2(3)

- I Street, Drainage and Building Act 1974, ss. 46(1), (3)(a), 69

Other source(s) referred to:

Malaysian Civil Procedure 2015, vol 1, Sweet and Maxwell, p 701, para 53/2/6

For the applicant - Mohd Yusuf Idris (K Kumarathiraviam with him); M/s Yusuf Idris & Co A

For the 1st respondent - Karin Lim Ai Ching (Murgan D Maniam with her); M/s Presgrave & Matthews

For the 2nd, 3rd & 4th respondents - Kanesan Muthusamy (KT Raja with him); M/s M Kanesan & Assocs

Reported by Sandra Gabriel B

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This case involves the iconic “Line Clear Restaurant” located at the side and/or back lane at No. 161 and 177, Penang Road, State of Penang. It is well known for its signature “Nasi Kandar” dishes. It is a familiar name to all in Penang and is a popular haunt for Penangites who throng the place to indulge in the wide array of mouth-watering dishes on display. Those from outside Penang and tourists alike are also aware of its popularity and likewise frequent the place for a meal when they visit the island. C D

[2] Because of its popularity and no doubt, its profit generating ability, difficulties have understandably arisen over its running and management. This has led to an unresolved dispute between the applicant and the second, third and fourth respondents. This dispute came to the attention of the first respondent. As a result, the first respondent on 10 November 2014 decided that the business at the site is to be carried out by way of rotation on a yearly basis among the applicant, second, third and fourth respondents respectively. The applicant being aggrieved with this decision has therefore resorted to the filing of a judicial review. E F

The Parties

[3] The applicant is the son of one S.N. Seeni Parkir since deceased, whom the applicant contends is the rightful owner of the Line Clear Restaurant business. G

[4] The first respondent is the local authority within the definition of s. 2 of the Local Government Act 1976.

[5] The second to fourth respondents were given a temporary hawker licence dated 20 September 2012 based on their fraternal relationship with the previous holders of the temporary hawker licence to operate the business at the site. H

Summary Of Parties Case

Applicant I

[6] The applicant contends that his late father, S.N. Seeni Parkir a/l Naina Mohamad started the “Line Clear Restaurant” although originally it was a coffee shop and light food selling stall in 1949.

- A [7] In 1952, S.N. Seeni Parkir brought in two workers from India namely Thulkarnain s/o S. Naina Mohamad and Rahimatollah s/o Naina Mohamad respectively as mere workers in the business. In 1959, the applicant's late father added the rice business into his coffee shop business. The rice business license (hereinafter, the said business) was however registered under the name of the applicant's late father's brother, Sekandar s/o Naina Mohamad.
- B [8] In 1971, the applicant's father passed away in the very premises where the said business was carried on. As the applicant and his other siblings were of tender age in 1971, it was agreed between the applicant's family and his two abovementioned workers that they will operate the said business together with Sekandar s/o Naina Mohamad on trust for the applicant's family until the applicant and/or his siblings could operate it by themselves in time to come.
- C [9] In 1975, as Sekandar s/o Naina Mohamad also passed away, the two Indian national workers namely Thulkarnain s/o S. Naina Mohamad and Rahimatollah s/o Naina Mohamad continued to operate the said business on trust for both the applicant's and the Sekandar families.
- D [10] In 1982, the two Indian national workers who were entrusted to operate the said business employed the third respondent.
- E [11] In 1989, the applicant on behalf of all his other siblings and being the rightful heir of his late father, participated in the operation of the said business. However, as the two Indian national workers were still holding licenses in their names, complete handing over of the said business to him could not be done.
- F [12] Meanwhile, in 1989, when the applicant began to participate in the said business, as a sign of facilitating the said entry, the said Thulkarnain s/o Naina Mohamad left and started his own Nasi Kandar business known as "Nasi Kandar Yasmee" which was located next to the said business at Penang Road in direct competition to the said business.
- G [13] Both the said Thulkarnain and Rahimatollah being the two Indian national workers employed by the applicant's late father passed away in the 1990's.
- H [14] In 2002, upon the applicant's own effort and initiative, the said business was duly registered with the name of "Line Clear Restaurant".
- I [15] Meanwhile in 2010, the second and third respondents in conspiracy with a few other individuals without the applicant's and/or his other siblings' knowledge registered another business under the name of "Restoran Nasi Kandar Line Clear" in respect of the said business. The second and third respondents together with others went on to transfer the EPF, SOCSO, workers' permits, PBA (water) and TNB (electricity) accounts from the said business to the said newly registered business without the applicant's knowledge and/or approval.

[16] As the result of the respondents' act as stated above, contrived with intent to cheat and/or deceive the applicant and his siblings, in 2011, the applicant took full control of the said business and operates it until today. A

[17] Based on the above facts, the applicant submits that, the first respondent's decision that the said business be operated on an annual rotation basis between four parties including the second to the fourth respondents is in error of law. This application therefore, they submitted, ought to be allowed. B

First Respondent

[18] The first respondent submitted that there were no records with them that showed that the applicant's father was granted a hawker licence to operate a food business at the said site. As such, they submitted that the applicant's father was trading at the said site illegally and without a hawker licence. The first respondent submitted also that the applicant had not shown any documentary evidence that his father was granted a hawker licence by the first respondent or a permission or stall licence by the predecessor in title to the first respondent. C D

[19] The first respondent said that they were only informed some time in the year 2012 of the existence of a general agreement dated 10 February 1987 between three licence holders namely Thukkarni, Aisha and Rahimatollah wherein among others they had agreed to administer and maintain the stalls concerned for a period of one year by way of rotation ('the said general agreement'). This general agreement was personal to the three parties involved namely the said Thukkarni, Aisha and Rahimatollah and did not involve the first respondent. The applicant and his wife Sharifah binti Abdullah were merely witnesses to the said general agreement and not parties thereto. E F

[20] The first respondent contended that by witnessing this general agreement, the applicant had admitted and conceded that Thukkarni, Aisha and Rahimatollah were legally and rightly entitled to trade at the said site. The applicant had thus waived all his rights to trade at the said site accordingly. G

[21] The applicant further had never been issued with any hawker licence previously by the first respondent and had no connection to these licensees. H

[22] In accordance with the general agreement dated 10 February 1987, the three licence holders concerned carried out their business at the said site by way of rotation and had agreed to the rotation system until the year 2017.

[23] According to the general agreement dated 10 February 1987, from the year 1988 to 2000 the three original licence holders were involved in the operation of business at the said site by way of three rotations. I

A [24] The applicant had managed the business of Aisha from the year 1989 during her rotation. Subsequently, in the year 2001, the daughter of Aisha had asked that her mother's rotation or turn to be returned and restored to her but this request was ignored by the applicant.

B [25] The applicant had applied for a business licence for a stall at premise No. 177 Penang Road ('Line Clear Restaurant') by letter dated 14 June 2010. The first respondent submitted that the said site does not belong to the applicant and it is a side lane or back lane and a public place maintained by the first respondent and therefore under their jurisdiction. The applicant further does not pay any assessment to the first respondent in respect of the said site nor pay any quit rent to the Land Administrator of Daerah Timur Laut. The said site which is a side lane or back lane and a public place was not suitable at all to operate a restaurant business.

D [26] A licence only confers a personal right to the licence holder. This right comes to an end when the holder in the case of a natural person dies. Being a personal right, the legal relationship thereby created is only between the licensor and licensee. The licence therefore is not transferable or incapable of assignment at the option of the licensee. It is not a right *in rem* which its holder can deal with as he or it pleases to the detriment of the issuing authority.

E [27] Therefore on 6 September 2012, the first respondent informed the applicant that his application for a business licence had been rejected as he had no licence at Line Clear Restaurant at No. 177 Penang Road previously.

F [28] The first respondent subsequently however reviewed and reconsidered the 1988 policy which decided that in the event the licence holder passes away or ceases from carrying out business, then the stall permit/licence at the side lane/back lane/pathways cannot be transferred to anybody and the stall shall be demolished. There were four applications made for licenses some time after the licence holders had passed away.

G [29] The first respondent did not act mechanically and reject these four applications. The first respondent had considered each case on its own merits and decided on 20 September 2012 that a temporary hawker licence from year to year be issued to these four applicants. The first respondent submitted that it retained the discretion to depart from its 1988 policy whenever public interest so demands wherein the first respondent considered the fraternal relationship of these applicants with the previous licence holders and was of the view that the departure from its original policy was justified to enable them to earn a livelihood.

H [30] The first respondent therefore decided to grant temporary hawker licence to the following applicants (ie, the latter names):

- I (i) Thukkarni s/o Naina Mohamed to Abdul Latiff Ali bin Thulkarunai ('second respondent')

- (ii) Rahimatollah s/o Naina Mohamed to Sahubarali a/l Ina China Mohd Hanibah ('third respondent') A
- (iii) Aisha d/o Kalandar Mastan to Pathumah binti Iskandar ('fourth respondent'); and
- (iv) M.S.M Mohamed Iqbal a/l M.S. Madar Sahib to Ahamed Bahurdeen bin Syed Mohamed Buhari. B
- [31] There were no objections to the variation of the 1988 policy made in 2012. In the circumstances, the first respondent was entitled to grant new hawker licences to the second, third and fourth respondents.
- [32] The first respondent did not allow the 1988 policy to override its statutory duty and discretion to grant hawker licenses pursuant to ss. 72 and 107 of the Local Government Act (LGA 1976) and the Hawkers By-Laws. C
- [33] It was submitted that the first respondent's decision to reject the applicant's application had not deprived the applicant of any benefits which he was entitled to. Records of the first respondent did not show that the applicant's father was granted a hawker licence by the predecessor of the first respondent. D
- [34] The applicant did not challenge the decision of the first respondent contained in the letter dated 6 September 2012 which rejected his application for a licence nor make any application for judicial review to challenge the decision of the first respondent on 6 September 2012. This meant the applicant accepted the decision of the first respondent and cannot now raise it as a collateral issue in this application for judicial review. It is therefore submitted that the applicant has no right to carry on trading or hawking at the said site. The rejection of the applicant's application for a business licence at the said site therefore did not infringe the applicant's rights. E F
- [35] In administrative law a decision maker or body is entitled to consult and have discussion regarding any matter, provided it retained the ultimate authority to make the final decision. Following from this, on 8 November 2012 a discussion was held by the first respondent with the applicant and the second to the fourth respondents. G
- [36] At the discussion on 8 November 2012, the applicant had admitted that based on the general agreement dated 10 February 1987 to which he was not a party, the original scheme of rotation involved three parties. There was a variation some time to the general agreement in 2001 wherein the applicant was also allowed to manage the business without a valid hawker licence. This family arrangement was among the four parties. H
- [37] In the year 2009 the stall was managed by the applicant but at the end of 2009 when Aisha passed away, the applicant refused to return the business rotation to Pathumah ('fourth respondent') the eldest daughter of Aisha, to commence her business in the year 2010. The applicant continued to carry on the business until the year 2012 without a hawker licence. I

- A [38] The third respondent was prevented from access to the said site by the applicant and the third respondent could not carry out his business in the year 2011. The second respondent had informed that he too could not carry out his business at the said site in the year 2012 as he was kept away from the said site by the applicant.
- B [39] Therefore although new hawker licences were issued by the first respondent on 20 September 2012 to the second, third and fourth respondents, they could not carry out business at the said site as the applicant refused to vacate and leave the said site. The applicant continued to carry out his business at the said site without a hawker licence.
- C [40] On 8 November 2012, the applicant refused to surrender the business operation at the site to the second, third and fourth respondents.
- [41] The second, third and fourth respondents disagreed with the proposal that each person must rotate once a year only and they wanted to follow the arrangement based on the original general agreement of 1987.
- D [42] However, the applicant had requested that himself, the second respondent and the fourth respondent be allowed to carry out the business based on the rotation scheme once a year for a period of four years with the applicant carrying out the business for a two year period. The applicant further wanted the third respondent to be excluded from this arrangement.
- E [43] After considering all the parties' views, the first respondent decided that the second, third and fourth respondents should carry out the business on a yearly basis by way of rotation based on the original general agreement of 1987. Temporary hawker licence would be given based on this decision
- F to the second, third and fourth respondents only.
- [44] So, by notice dated 3 July 2013, the first respondent had informed one Akhbar Ali bin Abdul Gaffoor who carried out the business at the said site that there was a breach of the Hawkers By-Laws 1979. Therefore, he must move out and give way and permit the three hawkers licenced by the first respondent namely the second, third and fourth respondents, to carry out business at the stalls concerned. The first respondent required Akhbar Ali bin Abdul Gaffoor to stop operating his business within three days from the date of the notice dated 3 July 2013. However, the notice was not complied with.
- G
- H [45] Pursuant to letters dated 5 July 2013 and 15 August 2013, solicitors Messrs Rosli Ismail & Co wrote to the first respondent in respect of the notice dated 3 July 2013 written by the first respondent to Akhbar Ali bin Abdul Gaffoor.
- I [46] By letter dated 15 August 2013, Messrs Rosli Ismail & Co had also written to the Honourable Deputy Chief Minister of Penang pertaining to the applicant's position. This letter was referred to the first respondent by the Chief Minister's Office.

- [47] By letter dated 11 September 2013, the first respondent replied to Messrs Rosli Ismail & Co and informed that the application by the applicant cannot be considered on the grounds that the applicant did not have a hawker licence previously. A
- [48] The applicant and his solicitor Rosli bin Ismail then attended a discussion on 12 September 2013 with second, third and fourth respondents who had already been licensed to trade at the said site. B
- [49] By a letter dated 23 December 2013, the first respondent granted the applicant, second, third and fourth respondents reasonable time to resolve the issue of rotation in carrying out the said business activity. All the parties concerned were advised to discuss and reach a settlement to run the business activity according to rotation. They were also informed that failing this, enforcement action would be instituted in accordance with the existing law. The letter was received by the applicant, second, third and fourth respondents. C
- [50] The first respondent waited for about 11 months after issuing the letter dated 23 December 2013. As there was no response from all the parties concerned, on 10 November 2014, the first respondent decided that the business at the site was to be carried out by way of rotation according to yearly basis among the applicant, second, third and fourth respondents respectively commencing from 1 January 2015. D
- [51] The first respondent had listened fairly to all the parties concerned and decided to depart from 1988 policy and the 2012 decision to licence only the second, third and fourth respondents. The first respondent had exercised its discretion reasonably and did not shut the door indiscriminately on the applicant. The first respondent had acted fairly and rationally and had given all affected parties an opportunity to trade at the said site. E
- [52] The applicant who had been carrying out the business at the said site commencing from the year 2010 without a hawker licence ought to have stopped operating the business at the said site from 31 December 2014. The said site was to be handed over to the second respondent for the next rotation commencing from 1 January 2015 based on the decision of 10 November 2014. However, this did not take place. F
- [53] The applicant through his solicitors by way of letters dated 13 November 2014 and 21 November 2014 respectively, informed the first respondent that he agreed to the rotational system but subject to conditions. This was not acceptable to the first respondent and therefore on 16 December 2014 a notice was issued in order for the implementation of the rotation system with effect from 1 January 2015. This notice was however, ignored by the applicant. The first respondent therefore submitted that this application ought to be dismissed. G
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A *Second To Fourth Respondents*

[54] The submissions of the second to the fourth respondents largely mirrored that of the submissions advanced by the first respondent minus the submissions relating to the first respondent's statutory obligations and duties in relation to the granting of licences to hawkers. This being the case, it will serve no purpose other than just mere repetition to reproduce their submissions.

Grounds For Judicial Review

[55] The grounds for judicial review in summary are as follows:

- C (i) Illegality – that the decision maker had failed to keep strictly within the perimeters of his powers;
- (ii) Irrationality or “*Wednesbury* unreasonableness” – that the decision was “so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”; and
- D (iii) Procedural impropriety – that the decision maker failed to observe basic rules of natural justice and or procedural rules.

E [56] See *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] AC 374 and *Ambank (M) Berhad v. Menteri Sumber Manusia & Anor And Other Appeals* [2014] 1 LNS 686.

F [57] For a more comprehensive and lucid exposition of what amounts to illegality, irrationality or “*Wednesbury* unreasonableness” and procedural impropriety, see the case of *Tenby World Sdn Bhd v. Soh Chong Wan & Anor* [2013] 10 CLJ 822 decided by Vernon Ong J (as His Lordship then was).

[58] Over the course of time the principle of proportionality has also been added to the above categories thus widening the scope of judicial intervention of administrative action by way of judicial review.

G [59] More recently, the boundaries that traditionally distinguished review for process and that of substance have been removed. See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; [1997] 1 AMR 433, and *Ranjit Kaur a/p S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

H **Analysis Of Arguments And Decision**

Leave Only Applied For And Granted For Certiorari

I [60] At the outset and by way of a preliminary point, the respondents in unison submitted that as leave was granted only for the relief of *certiorari* but no leave was applied for by the applicant or granted by the court in respect of the other prayers claimed in the application proper, namely, *mandamus* and declaration, no relief in respect of those prayers can now be given therefore.

[61] The provisions of O. 53 r. 2(3) of the Rules of Court 2012 however, confers wide powers upon the court in the matter of remedies. It reads as follows:

Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

[62] See *Malaysian Civil Procedure 2015 Volume 1, Sweet and Maxwell* para. 53/2/6 at p. 701 which referred to the said order as a codification of the principles enunciated in the Federal Court case of *R Ramachandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 AMR 433; [1997] 1 MLJ 145.

[63] The court is therefore not confined to the specific remedy or remedies claimed by the applicant and may mould the remedy appropriate to meet the facts and circumstances of the particular case. The duty of the court is to render substantial justice. The discretion must of course be exercised judicially. Therefore the omission of the applicant in specifically praying for the orders of *mandamus* or a declaration does not prohibit the court from granting these orders in an appropriate case. I therefore do not find merit in the arguments advanced by the respondents in respect of this issue.

Whether The Decision Of The First Respondent To Grant Temporary Hawker Licences In 2012 To The Second To The Fourth Respondents Which Constituted A Departure From The First Respondent's Policy In 1962 And 1988, Was Justified?

[64] In 2012, licences were granted to the following latter named persons following earlier licences issued in 1981 to the first named persons below:

- (i) Thukkarni s/o Naina Mohamed to Abdul Latiff Ali bin Thulkarunai ('second respondent');
- (ii) Rahimatollah s/o Naina Mohamed to Sahubarali a/l Ina China Mohd Hanibah ('third respondent');
- (iii) Aisha d/o Kalandar Mastan to Pathumah binti Iskandar ('fourth respondent'); and
- (iv) M.S.M Mohamed Iqbal a/l M.S. Madar Sahib to Ahamed Bahurdeen bin Syed Mohamed Buhari.

[65] This constituted a departure from the earlier policy of the first respondent in 1988 which decided that in the event the licence holder passes away or cease from carrying out business, then the stall permit/licence at the side lane/back lane/pathways cannot be transferred to anybody and the stall shall be demolished.

[66] Notwithstanding, it is my finding that the first respondent had retained the discretion to depart from its earlier policy in so doing. The earlier policy was not intended by the first respondent to self-impose a fettering of its

- A discretion whenever a change of circumstances warranted such a change. It was entitled where public interest so necessitates, to consider the matter afresh and on the individual merits of the case and so was justified in taking into account the fraternal relationship of these applicants with the previous licence holders.
- B [67] This approach was also in contradistinction to acting in a pure mechanical manner which is against established principles in administrative law. See *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585.
- C [68] The provisions of ss. 72(1) and 107(2) of the LGA 1976 also confers wide powers and discretion upon the first respondent in imposing conditions and restrictions in the manner in which licenced hawkers may operate.
- D [69] This approach was also justified and well within the jurisdiction of the first respondent in order to enable them to earn a livelihood. The exception to the 1988 policy was therefore justified under the circumstances. In any event, the applicant's rights were not infringed as a result and there was no challenge to this decision by way of judicial review and I therefore agree with the contention of the first respondent that this cannot now be raised as a collateral issue in the current proceedings.
- E *Whether Rejection Of The Applicant's Application For Business Licence For Line Clear Restaurant Informed To The Applicant By Way Of Letter On 6 September 2012 Had Deprived Him Of Any Benefit That He Was Entitled To?*
- F [70] It was evident that the records of the first respondent did not show that the applicant's father was granted and was in possession of a hawker licence by the first respondent or its predecessor. The applicant also had no licence at Line Clear Restaurant at No. 177 Penang Road previously and no documents to show a contrary position was produced before the court.
- G [71] The applicant's submission that he had a right to carry on trading at the said site is thus untenable. The rejection of the applicant's application had not infringed his rights. Further, as alluded to above, no challenge by way of judicial review was taken in respect of this decision and this cannot now be raised to mount what is in effect a collateral attack in the current application. Estoppel will also operate to preclude the applicant from raising this now.
- H *Whether The Decision Of The First Respondent On 10 November 2014 (Impugned Decision) To Grant The Hawker Licence On An Annual Rotation Basis To The Applicant And The Second To The Fourth Respondents Was Ultra Vires, Procedurally Irregular, Unreasonable Or Disproportionate?*
- I [72] The decision that is sought to be impugned ie, 10 November 2014 decision, has to be viewed against the backdrop of the first and second general agreements dated 10 February 1987 and 2001 respectively involving

three parties to which the applicant was not a party to. The variation to the general agreement or second general agreement, allowed the applicant to manage the business without a valid hawker licence. A

[73] One of the parties to the general agreement namely Aisha had allowed the applicant to manage the business in her stead from 1989 but at the end of 2009 when Aisha had passed away, the applicant refused to return to the rotation system as agreed by handing over the business to the fourth respondent (eldest daughter of Aisha) to commence business in 2001. B

[74] It is also noteworthy to mention that the general agreement in 1987 was in fact witnessed by the applicant and his wife, Sharifah binti Abdullah. When the terms of the variation to the general agreement or second general agreement which allowed the applicant to operate the business for and on behalf of Aisha was effected, the agreement was witnessed by the applicant's wife. C

[75] Although new hawker licences were issued by the first respondent on 20 September 2012 to the second, third and fourth respondents respectively, they could not carry out business at the said site as the applicant refused to vacate and leave the said site. The applicant continued to carry out his business at the said site without a hawker licence. D

[76] On 8 November 2012, the applicant refused to surrender the business operation at the site to the second, third and fourth respondents. The second, third and fourth respondents disagreed with the proposal that each person must rotate once a year only and they wanted to follow the arrangement based on the original general agreement of 1987. E

[77] However, the applicant had requested from the first respondent that the applicant, second respondent and the fourth respondent be allowed to carry out the business based on the rotation scheme once a year for a period of four years with the applicant carrying out the business for a two year period. The applicant further wanted the third respondent to be excluded from this arrangement. F
G

[78] After considering all the parties views, the first respondent decided that the second, third and fourth respondents should carry out the business on a yearly basis by way of rotation based on the original general agreement of 1987. Temporary hawker licence would be given based on this decision to the second, third and fourth respondents only. H

[79] The applicant then embarked upon a series of overtures through his then solicitor with the view to discussing the matter of rotation of the business with the second, third and fourth respondents. The first respondent agreed to grant reasonable time to the above parties to resolve the rotation issue. In the absence of any feedback from the above parties, on 10 November 2014, the first respondent decided that the business at the site is to be carried out by way of rotation according to yearly basis among the applicant, second, third and fourth respondents. I

- A [80] The first respondent had thus acted reasonably in allowing the participation of the applicant in the rotation. The applicant therefore who had been operating at the site from 2010 without a hawker licence ought to have ceased operating the said business with effect from 31 December 2014 and have handed over the site to the second respondent for the rotation
- B commencing 1 January 2015. The action of the applicant in preventing the first respondent from commencing enforcement action in compliance with the rotation is also unwarranted and constitutes an obstruction of the lawful duties by the first respondent.
- C [81] In light of the fact that the first respondent had listened to all the views of the parties and had given them reasonable time to resolve the issue of the rotation of the business before making their decision on 10 November 2014, it cannot be said that there was any procedural impropriety on the part of the first respondent.
- D [82] The impugned decision also is not *ultra vires* the powers of the first respondent. The first respondent is the local authority responsible for the Island of Penang pursuant to the Local Government Act (LGA) 1976 and also the Street, Drainage and Building Act (SDB) 1974.
- E [83] The first respondent is also empowered under the LGA 1976 to regulate and licence hawking. The LGA 1976 gives the first respondent a very wide discretion in regulating hawkers. It also empowers them to seize, destroy or dispose of any food or drink if the temporary buildings, stalls etc. are not so licensed. Pursuant to s. 72(1) of the LGA 1976 the first respondent has the power:
- F (i) To licence temporary buildings, stalls whether stationery or otherwise, set up or use for the sale of any food or drink in streets, public places or places of public resort or on private premises; and
- (ii) To seize, destroy or dispose of any food or drink if the temporary buildings, stalls etc. are not so licenced.
- G [84] Pursuant to s. 107(2) of the LGA 1976, the first respondent has the power to grant any licence or permit for hawking businesses on such conditions and restrictions as the first respondent may think fit and may revoke them at any time without assigning any reason therefore.
- H [85] It is therefore a matter for the first respondent to decide whether it would restrict licences to hawkers or whether to grant licences to all hawkers. The first respondent is also entitled to introduce or to change the policy on hawking subsequently if it feels that the circumstances require it.
- I [86] The first respondent may also impose conditions and restrictions subject to which licensed hawkers may operate in the scheme of licensing.
- [87] Section 107(3) of the LGA 1976 provides as follows:
- (3) The local authority may at its discretion refuse to grant or renew any licence without assigning any reason therefore.

- [88] By-Law 3 of the said Hawkers By-Laws 1979 provides that no person shall act as a hawker without a licence issued by the first respondent. A
- [89] By-Law 4(7) of the said Hawkers By-Laws provides that the first respondent may at its discretion refuse to grant or renew any licence without assigning any reason therefore. B
- [90] By-Law 7(1) (c) of the said Hawkers By-Laws provides that no hawker shall carry on his business on a back lane unless permitted by the first respondent. B
- [91] The first respondent is empowered to restrict or prohibit hawkers from carrying on business in any special place or area or otherwise than in any specified place or area. Licenses are not assignable or transferable without the prior written consent of the first respondent. C
- [92] Pursuant to s. 69 of the Street, Drainage and Building Act (SDB) 1974, no person shall erect or maintain or permit to be erected or maintain any obstruction in or over any back lane and the first respondent may, where any such obstruction exists, take down and remove the same summarily as otherwise the very object of laying out the back lane to facilitate emergency vehicles and traffic may be defeated. No statutory notices are required to be issued by the first respondent to any person contravening s. 69 of the SDB 1974. D E
- [93] According to s. 46(1) of the SDB 1974, any person who builds, erects, sets up or maintains or permits to be built, erected or set up or maintained any wall, fence, rail, post or any accumulation of any substance, or other obstruction, in any public place shall be guilty of causing an obstruction. F
- [94] Pursuant to s. 46(3)(a) of the SDB 1974, the first respondent may cause any such obstruction to be removed summarily. No statutory notice is required to be issued by the first respondent to any person contravening s. 46 of the SDB 1974. F
- [95] It is therefore evident that it is well within the powers of the first respondent to regulate and licence the business of hawking and a very wide discretion and overriding power is accorded to it. As alluded to earlier, it was open to the first respondent to consider the merits of each application on its own and adopt a change of previous policy and although it had adopted the blood relationship approach in according licences to the second to the fourth respondents, this cannot be taken to give rise to the allegation that it had misdirected itself by asking the wrong question. Accordingly, I find that the powers exercised by the first respondent was not *ultra vires* its powers and is therefore devoid of any element of illegality. G H
- [96] With regard to the issue of legitimate expectation, I agree with the contentions advanced by counsel for the respondents that as the applicant had never previously held any licence, the decision of the first respondent could not give rise to any legitimate expectation on the part of the applicant as there I

A was no deprivation of some benefit or advantage which had been previously held and enjoyed. See *Council of Civil Service Unions v. Minister for the Civil Service (GCHQ case)* [1985] AC 374.

B [97] In that regard there is a material difference between the “expectation cases” applicable to existing licence holders or those who had previously held licences and applies for a renewal thereof from the “application cases” where no such right previously existed. Legitimate expectation can only arise if at all in the former cases, but not the latter. See *McInnes v. Onslow Fane and Another* [1978] 1 WLR 1520; [1978] 3 All ER 211.

C [98] Further, as the applicant had been carrying on business at the site from 2010 until 2014 and continuing without a valid licence and without the approval of the first respondent, no such legitimate expectation could arise out of such illegal act. See *John Peter Berthelsen v. Director-General of Immigration Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134.

D [99] The applicant is also not in a position to dictate the terms and manner of the rotation that it deems suitable to the first respondent as it is the latter that is endowed with statutory authority to make decisions regarding the issuing of hawker licences and there cannot be an encroachment or a usurping of their powers.

E [100] Furthermore, the core of the dispute between the applicant and the respondents arises out what is essentially a contractual dispute between themselves and cannot involve the first respondent as a party with the intention of resolving their private dispute. It is trite that the remedies sought by way of judicial review is in the realm of public law.

F [101] The applicant therefore has alternative recourse in contract against the second to fourth respondents if he is of the view that there has been a breach of any obligations on their part.

G [102] I also find that the registration of the business in the year 2002 in the name of “Line Clear Restaurant” with the Companies Commission of Malaysia did not clothe it with the legality that it never had in the first place and neither would the act of registering with EPF, SOCSO, Service Tax and application for workers permits.

H [103] The decision of the first respondent is also for the reasons given above not unreasonable in the *Wednesbury* sense nor was it disproportionate under all the circumstances of the case. I therefore dismiss the applicant’s application with costs.

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